

**Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin
& Ors v Lee Tak Suan & Anor**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-1150
OF 2006
MOHD GHAZALI, ZULKEFLI AND LOW HOP BING JJCA
18 JANUARY 2008

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*Civil Procedure — Originating summons — Striking out — Whether disclosed
no reasonable cause of action, scandalous, frivolous or vexatious or otherwise an
abuse of process — Rules of the High Court 1980 O 18 r 19*

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*Unincorporated Associations — Societies — Suits — Claim by members of club
for damages for breach of trust and breach of fiduciary duties — Claim instituted
by way of derivative action or representative action — Whether maintainable —
Rules of the High Court 1980 O 15 r 12*

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The Selangor Turf Club ('the club') is an unincorporated society registered under the Societies Act 1966. The club is managed by a committee of eight ordinary members. The appellants (the first to fifth and seventh defendants in the court below) were committee members for the years 2003-2005. The respondents (the plaintiffs in the court below) are ordinary members of the club. They initiated a derivative action against the defendants alleging ultra vires, breach of the club's constitution, breach of trust, breach of fiduciary duty and negligence. The appellants applied to strike out the originating summons filed by the respondents on the grounds that it disclosed no reasonable cause of action or is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court. The basis for the application was that the respondents were said to have no locus standi and competency to bring the derivative action on behalf of the club. The High Court dismissed the application. The appellants appealed to the Court of Appeal.

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Held, allowing the appeal in part:

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- (1) A derivative action is a procedural device which originated from the sphere of company law, with its origin in *Foss v Harbottle*, setting out the general principles, to which exceptions have been developed by the English courts (see para 12).

- A (2) Counsel for the respective parties herein appeared to have achieved a common ground when they jointly relied on the *Raintree Club* case. The *Raintree Club* case was on the same footing as the club in the instant appeal in that both were unincorporated societies registered under the Societies Act 1966 (see para 24).
- B (3) The plaintiff's reliance on the *Raintree Club* case was apparently an affirmation that the proper action to be commenced by the plaintiff was a representative action, and hence an abandonment of the plaintiff's contention based on the applicability of a derivative action (see para 26).
- C (4) The ratio in the *Raintree Club* case should be followed and that representative action is the answer to the instant appeal. A representative action is provided for under O 15 r 12 of the Rules of the High Court 1980. Since the plaintiff's cause of action by way of a representative action had never been doubted, it was abundantly clear that O 18 r 19(1)(a), (b) or (d) had no application. Hence, there was no question of striking out the plaintiff's action (see paras 28–29).
- D (5) The order of the High Court allowing the plaintiff's action by way of derivative action was set aside and substituted by a representative action under O 15 r 12 (see para 30).
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[Bahasa Malaysia summary]

- F Kelab Lumba Kuda Selangor ('kelab itu') adalah persatuan bukan perbadanan yang didaftarkan di bawah Akta Persatuan 1966. Kelab itu diuruskan oleh satu jawatankuasa dengan lapan ahli biasa. Perayu-perayu (defendan-defendan pertama hingga kelima dan ketujuh di mahkamah bawahan) merupakan ahli-ahli jawatankuasa bagi tahun 2003-2005. Responden-responden (plaintif-plaintif di mahkamah bawahan) merupakan ahli-ahli biasa kelab itu.
- G Mereka telah memulakan satu tindakan terbitan terhadap defendan-defendan mendakwa ultra vires, pelanggaran perlembagaan kelab, pelanggaran amanah, pelanggaran tanggungjawab fidusiari dan kecuai. Perayu-perayu telah memohon pembatalan saman semula yang difailkan oleh responden-responden atas alasan bahawa ia tidak menunjukkan kausa tindakan munasabah atau adalah melampau, remeh atau menyusahkan atau
- H adalah sebaliknya satu penyalahgunaan proses mahkamah. Asas permohonan ini adalah bahawa responden-responden dikatakan tiada locus standi dan kekompetenan untuk memulakan tindakan terbitan bagi pihak kelab itu. Mahkamah Tinggi telah menolak permohonan itu. Perayu-perayu telah
- I merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan sebahagian daripada rayuan tersebut:

- (1) Suatu tindakan terbitan adalah cara prosedur yang berasal daripada

- skop undang-undang syarikat, yang asalnya dalam *Foss v Harbottle*, yang membentangkan prinsip-prinsip am, yang mana pengecualian-pengecualian telah diwujudkan oleh mahkamah-mahkamah Inggeris (lihat perenggan 12). A
- (2) Peguam bagi pihak-pihak berkaitan di sini kelihatan telah mencapai alasan yang sama semasa mereka bersama bergantung kepada kes *Raintree Club*. Kes *Raintree Club* adalah serupa dengan kelab itu dalam rayuan semasa di mana kedua-duanya persatuan bukan perbadanan yang berdaftar di bawah Akta Persatuan 1966 (lihat perenggan 24). B
- (3) Kebergantungan plaintif dalam kes *Raintree Club* jelas satu pengakuan bahawa tindakan sewajarnya untuk dimulakan oleh plaintif adalah tindakan representasi, dan justeru itu hujah plaintif berdasarkan penggunaan tindakan terbitan digugurkan (lihat perenggan 26). C
- (4) Ratio dalam kes *Raintree Club* hendaklah diikuti dan tindakan representasi adalah jawapan kepada rayuan semasa. Suatu tindakan representasi diperuntukkan di bawah A 15 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980. Memandangkan kausa tindakan plaintif melalui tindakan representasi tidak pernah diragui, ia adalah jelas bahawa A 18 k 19(1)(a), (b) atau (d) tidak terpakai. Justeru itu, tiada persoalan tentang membatalkan tindakan plaintif (lihat perenggan 28–29). D
- (5) Perintah Mahkamah Tinggi membenarkan tindakan plaintif melalui tindakan terbitan diketepikan dan digantikan oleh tindakan representasi di bawah A 15 k 12 (lihat perenggan 30).] E
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Notes

For cases on striking out of originating summons, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4906–4912.

For cases on suits by societies, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2737–2738. G

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417 (refd) H

Cotter v National Union of Seamen [1929] 2 Ch 58 (refd)

Edwards v Halliwell [1950] 2 All ER 1964 (refd)

Foss v Harbottle [1843] 2 Hare 461; [1843] 67 ER 189; (refd)

Hui Huat v Datuk Khoo Eng Choo [1999] 3 CLJ 777 (refd) I

Taylor & Anor v National Union of Mineworkers (Derbyshire Area) & Ors [1985] BCLC 237 (refd)

Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd [1996] 2 MLJ 265 (refd)

A Legislation referred to

Companies Act 1965 s 16(5)
Co-operative Societies Act 1993 s 9
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)
Societies Act 1966

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Appeal from: Originating Summons No S3–24–2357 of 2005 (High Court, Kuala Lumpur)

C *V Sithambaram (Sithambaram & Associates) for the appellants.*
Thommy Thomas (ThommyThomas) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

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E [1] On 20 September 2006, the learned judge of the Kuala Lumpur High Court dismissed the application of the appellants-defendants ('the defendants') which sought to strike out the originating summons of the respondent-plaintiff ('the plaintiff') under O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980.

F [2] In essence, O 18 r 19(1) (a), (b) or (d) empowers the court at any stage of the proceedings to eg strike out any action on the ground that it discloses no reasonable cause of action; or is scandalous, frivolous or vexatious; or is otherwise an abuse of the process of the court, respectively.

[3] The defendants have now appealed against that decision.

G FACTUAL BACKGROUND

[4] The Selangor Turf Club ('the club') is an unincorporated society registered under the Societies Act 1966.

H [5] The club is governed by its constitution and rules, which operate as a contract between the club and its members, and between the members inter se.

I [6] The club is managed by a committee of eight ordinary members pursuant to r 20(a) of the club's constitution. Defendants 1 to 5, and 7 are such committee members for the years 2003–2005.

[7] The plaintiffs are ordinary members of the club. They initiated a derivative action against the defendants alleging ultra vires, breach of the club's constitution, breach of trust, breach of fiduciary duty and negligence in causing the club to invest the sum of RM30 million in Fountain View Development Bhd.

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[8] The defendants denied the above allegations, and asserted that they have powers under the constitution to make the investment, which has already been fully recovered, with an investment return of approximately RM2.376 million.

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DERIVATIVE ACTION

[9] The defendant's learned counsel Dato' V Sithambaram challenged the plaintiff's locus standi and competency in bringing the derivative action on behalf of the club, which is an unincorporated association or society. He referred to, inter alia:

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- (1) *Foss v Harbottle* [1843] 2 Hare 461; [1843] 67 ER 189;
- (2) *Cotter v National Union of Seamen* [1929] 2 Ch 58;
- (3) *Taylor & Anor v National Union of Mineworkers (Derbyshire Area) & Ors* [1985] BCLC 237;
- (4) *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 (CA);
- (5) s 16(5) of the Companies Act 1965; and
- (6) *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265 ('the Raintree Club case').

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[10] In supporting the derivative action, Mr Tommy Thomas, plaintiff's learned counsel relied on:

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- (1) *Hui Huat v Datuk Khoo Eng Choo* [1999] 3 CLJ 777 (HC); and
- (2) The *Raintree Club* case.

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[11] The High Court upheld the plaintiff's derivative action.

[12] In my judgment, derivative action is a procedural device which originated from the sphere of company law, with its origin in *Foss v Harbottle*, setting out the general principles, to which exceptions have been developed by the English courts.

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A *Foss v Harbottle* concerns a suit brought by two shareholders of a company against inter alia its directors who were alleged to have misapplied and improperly used the company's property. It was held that the injury complained of was that suffered by the company which was different from its members. The proper plaintiff should have been the company and the members could not maintain such a suit (see also Walter Woon, *Company Law* (2nd Ed) p 51).

B *Foss v Harbottle* gave rise to the proper plaintiff rule in so far as a company is concerned. In particular, this rule was subsequently stated by Jenkins LJ for the Court of Appeal in *Edwards v Halliwell* [1950] 2 All ER 1964, at pp 1066–1067. The general principles may be enumerated as follows:

- C (1) the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself; and
- D (2) where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter.

- E [13] The general principles are subject to certain exceptions, viz:
- F (a) where the act complained of is wholly ultra vires the company or association, because there is no question of the transaction being confirmed by any majority; and
- G (b) where what has been done amounts to a fraud on the minority and the wrongdoers are themselves in control of the company; the aggrieved minority are allowed to bring what is known as minority shareholders' action on behalf of themselves and all others. The rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.

H [14] In Malaysia, the nature of a derivative action was examined in *Abdul Rahim Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 (CA) where Gopal Sri Ram JCA observed that the derivative action is an ingenious procedural device created by courts of equity, by which the rule of judicial non-interference is overcome.

I [15] His Lordship added (at p 427):
It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants.

The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

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TRADE UNIONS

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[16] The rule in *Foss v Harbottle*, and the exceptions allowing the filing of derivative action in relation to a company have been extended to a trade union in *Edwards v Halliwell*.

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[17] Other illustrations of trade unions being allowed to take derivative actions include *Cotter*, and *Taylor & Anor*.

CO-OPERATIVE SOCIETY

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[18] Derivative action has also been applied to a co-operative society eg in *Hui Huat*. There, the plaintiff filed an originating summons seeking leave to sue the first and second defendants who were formerly, on the application of Bank Negara on 7 January 1987, the court-appointed receivers ('the receivers') of the third defendant, a co-operative society. The plaintiff had alleged their wrongdoings to the co-operative society and its members. A consent order dated 1 June 1997 was entered by Bank Negara as applicant; the co-operative society as respondent; Tai Jip Keh @ Tai Min Pak as the first intervenor; and the Registrar General of Co-operative Societies as the second intervenor. The consent order had relieved the receivers from all the liabilities in respect of their actions under the receivership. In relation to the plaintiff's originating summons, Azmel J (now FCJ) followed *Abdul Rahim bin Aki* and observed that the plaintiff as a member of the co-operative society could only sue the receivers by way of a derivative action, but stressed that by virtue of the consent order, the co-operative society and consequently the plaintiff as a member thereof were stopped from bringing any action against the receivers. His Lordship observed that a derivative action is not an independent cause of action but a cause of action accruing to the co-operative society for and on which behalf individual members can enforce.

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[19] The central figure in *Hui Huat* was a co-operative society regulated by s 9 of the Co-operative Societies Act 1993 in the following words:

9 Societies to be bodies corporate

A The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted.

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[20] Section 9 of the Co-operative Societies Act 1993 clearly confers upon a co-operative society registered under the Act the capacity of a body corporate and legal entity to sue or be sued by its name, in the same manner as provided under s 16(5) of the Companies Act 1965 in relation to a company.

REPRESENTATIVE ACTION

D [21] The issue which this court has to decide is whether the plaintiff's action should be commenced by derivative action or representative action.

E [22] Counsel for the respective parties herein appear to have achieved a common ground when they jointly relied on the *Raintree Club* case. *Raintree Club* is an unincorporated society registered under the Societies Act 1966. There, the members of the club brought a representative action against the defendants-appellants as promoters of the club for damages for breach of fiduciary duty in relation to a share acquisition agreement. Both Zakaria Yatim J (later FCJ) in the High Court, and the Court of Appeal concurrently held that the procedural device of a representative action provides the right answer. Gopal Sri Ram JCA speaking for the Court of Appeal, observed that (at p 289):

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- G (1) the action there was instituted against those persons who were, at the material time, purporting to act in their capacity as officers of the club, namely, as office bearers and members of the pro-tem committee, for allegedly breaching the fiduciary duties that they owed the club; and
- H (2) due regard should also be had to the fact that it is the members of the club who are the ultimate victims of any wrongdoing on the part of the appellants; for it is they who have to pay the sum stipulated in the share acquisition agreement.

I [23] The *Raintree Club* case is on the same footing as the club in the instant appeal in that both are unincorporated societies registered under the Societies Act 1966.

[24] The plaintiff's reliance on the *Raintree Club* case, is apparently an affirmation that the proper action to be commenced by the plaintiff is a

representative action, and hence an abandonment of the plaintiff's contention based on the applicability of a derivative action.

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[25] The judgment of the High Court, which has become the subject matter in this appeal, has focused exclusively on the applicability of derivative action to the exclusion of representative action.

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[26] I am of the view that the ratio in *Raintree Club* case should be followed and that representative action is the answer to the instant appeal. A representative action is provided for under O 15 r 12 of the Rules of the High Court 1980.

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[27] Since the plaintiff's cause of action by way of a representative action has never been doubted, it is abundantly clear to me that O18 r 19(1)(a),(b) or (d) has no application. Hence, there is no question of striking out the plaintiff's action.

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CONCLUSION

[28] On the foregoing grounds, I allow this appeal in part. The order of the High Court allowing the plaintiff's action by way of derivative action is set aside and is substituted by a representative action under O 15 r 12.

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[29] In the circumstances of this appeal, parties are ordered to bear their own costs here and in the court below.

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[30] Deposit is to be refunded to the defendants.

[31] My learned brothers, Mohd Ghazali bin Mohd Yusof JCA and Zulkefli bin Ahmad Makinudin JCA (now FCJ) have read this judgment in draft and have expressed their agreement with it to become the judgment of this court.

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Appeal allowed in part.

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Reported by Brendan Navin Siva

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